

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

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In the matter of the adoption	)	<b>PRESIDING OFFICER REPORT</b>
of new rules I through X	)	
pertaining to water use	)	
classifications and numeric	)	
nutrient standards; and the	)	
amendment of ARM 17.30.602 and	)	
17.30.619 pertaining to	)	
definitions and incorporations	)	
by reference	)	

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**INTRODUCTION**

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1. On May 13, 2002, I presided over and conducted the public hearing held in Room 111 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana, to take public comment on the above-captioned matter. Notice of the hearing was contained in 2002 Montana Administrative Register (MAR) No. 7, MAR Notice No. 17-158, published on April 11, 2002. A copy of the notice is attached to this report.

2. The hearing began at 10:12 a.m. and concluded at about 11:35 a.m. Ms. Petrina Horne of the Department of Environmental Quality (DEQ) made a tape recording of the hearing.

3. Names of persons wishing to submit their data, views, or arguments concerning the proposed action, either orally or in writing, were collected on forms provided at the hearing. These forms and written comments received at the hearing are attached to this report. Also attached to this report are written

comments received during the public comment period, which concluded at 5 p.m. on May 20, 2002.

4. At the hearing I identified and summarized the MAR notice, stated that copies of the MAR notice (proposed adoption and repeal) were available in the hearing room, read the Notice of Function of Administrative Rule Review Committee as required by Mont. Code Ann. § 2-4-302(7)(a), informed the persons at the hearing of the rulemaking interested persons list and of the opportunity to have their names placed on that list, recited the authority to make the proposed rule adoption and amendment, announced the opportunity to present matters at the hearing or in writing, as stated in the MAR notice, and explained the order of presentation.

5. At the conclusion of the hearing, I announced that the proposed rulemaking was expected to be considered by the Board at its meeting on July 26, 2002.

#### **SUMMARY OF HEARING**

6. Christian J. Levine, DEQ, made a statement in support of the proposed adoption of new rules I through IX and also submitted a written statement which, in more detail, is consistent with his oral statement.

7. Michael W. Suplee, DEQ, made a statement in support of new rule X and also submitted a written statement which, in more detail, is consistent with his oral statement.

8. Claudia L. Massman, Attorney Specialist, DEQ, made a statement in support of the proposed rulemaking and also

submitted a written statement which, in more detail, is consistent with her oral statement that the rules are not more stringent than federal standards and that there are no taking or damaging implications.

9. Jim Carlson, Missoula City-County Health Department, made a statement in support of new rule X. He is a member of the VNRP subcommittee. He suggested that the title of new rule X be changed to "Numeric Agal/Chlorophyll Standards" and that those standards be listed first in the rule (instead of phosphorus and nitrogen being listed first). A note should be added to the rule stating that the nutrient standards are intended to obtain compliance with the algae standards. The rule should state that the nutrient standards are based on the best available information and that further monitoring may result in refinement of the nutrient standards. The VNRP has been approved as a TMDL by the EPA. Butte, Deer Lodge, Missoula, and Stone Container are reducing discharges of nutrients and under the new rule, others will have to comply with the TMDL's in the VNRP, which is fair. Missoula plans to spend \$15 million on an upgrade of its sewer treatment plant and to connect up to 3500 additional residences to the system.

10. William C. McDowell, VNRP coordinator for the Tri-State Water Quality Council, made a statement on behalf of the Council in support of new rule X. The Council is composed of 25 entities in the states of Montana, Idaho, and Washington. The Council has been working for eight years on nutrient problems in

the Clark Fork River and downstream waters. The purpose of the VNRP is to reduce nutrients to reduce algae growth. Butte modified its sewage treatment plant to reduce nutrient discharges. Deer Lodge will use land application to reduce nutrient discharges. Stone Container has made plant modifications. Some progress has been made. The new rule X will consolidate the progress.

11. Matt Clifford, staff attorney, Clark Fork Coalition, a nonprofit entity, made a statement in favor of new rule X. The new rule would help preserve the improvements made in the nutrients problem in the Clark Fork River under the VNRP. EPA formally adopted the VNRP as a TMDL, but this is not binding on all dischargers in the river basin.

12. Starr Sullivan, Wastewater Division Superintendent, City of Missoula, made a statement in favor of new rule X. The standards protect the river from other dischargers and affirm the limits set by the VNRP.

13. Frank Little made a statement on behalf of the Town of Geraldine in north central Montana, in favor of new rules I through IX. The new rules eliminate the need for mixing zones within receiving streams and address a wastewater problem affecting up to 50 small municipalities.

14. Joanne C. Comer made a statement in favor of new rules I through IX on behalf of the Willow Creek Sewer District, which is about six miles south of Three Forks. Discharge ditches do

not support uses under the Clean Water Act and could not meet the standards to protect such uses.

15. John E. Bloomquist an attorney representing the Montana Stockgrowers and Montana Farm Bureau, made a statement opposing new rules I through IX. The rules are unclear and overbroad. There are many unanswered questions about the use attainability analysis. How will it be implemented? How will it be funded? What is meant by potential uses? The rules would add another layer of duties to DEQ at a time when it must assess bodies of water and develop TMDLs. In new rule I, the term "return flows" is overbroad because all ditches return to surface or ground water. Rule II, pertaining to ditches, does not recognize that ditches usually are not used for secondary contact recreation. They are used for irrigation and stock watering. Rule II(2) is unclear and (a) and (b) are unclear regarding which WQB-7 standards apply--only those for carcinogens or for all WQB-7 standards? Rule III uses the term "aquatic life" which is subject to interpretation. Mr. Bloomquist suggested that the rules address the specific concerns of small municipalities instead of being written in such broad terms.

16. Reed Smith of Frenchtown stated his opposition to new rule X.

17. John Rice of Montanans for Better Government made a statement in opposition to new rule X. The Montana Constitution mandates a clean and healthful environment, but takings and damagings will occur if new rule X is implemented.

18. Gerard Berens made a statement in opposition to new rule X on behalf of the Target Range Homeowners. He submitted a written statement substantially the same as his oral statement.

19. Cathy Schindler made a statement in opposition to new rule X on behalf of the Missoula East/West Reserve Street Residents. The Missoula Wastewater Treatment Plant is a polluter of the Clark Fork River. Rule X seems to be crafted to allow Missoula to increase its pollution. We need standards that are uniform and more stringent.

20. Will Snodgrass of Missoula made a statement in opposition to new rules I through X. Rules III, IV, and others appear to raise the fecal coliform standard from 200 per 100 ml to 1000 per 100 ml. Rule IV and others refer to standards in WQB-7 with a bioconcentration factor greater than 300. Bio-accumulation is a concern, especially with carcinogens, and the factor of 300 needs to be reduced. Rule IV(2)(b) is unclear. What does the phrase, "When the natural water quality exceeds the standards in WQB-7" mean? Does "exceeds" mean "better than the standards" or "worse than the standards"? Rule V is vague. Will children playing in the water be protected? What is meant by "physical conditions"? Would chemical run-off from weed control be considered a physical condition? Rule VIII refers to wildlife. Many dead deer have been found downstream of the Missoula wastewater treatment plant. DEQ should interface with

the Department of Agriculture and Fish, Wildlife, and Parks. The rule should refer more specifically to wildlife. Rule X allows phosphorus concentration of 20 ug/L upstream from the River Street Bridge in Missoula and 39 ug/L downstream from the same bridge. This great increase in the allowed concentration seems to be written to allow for the inefficient operation of the Missoula wastewater treatment plant, which is downstream of the bridge. The justification for the rule under the heading "REASON" is confusing. The meaning of the sentence beginning "Alternately" is unclear.

21. Wally Sept made a statement in opposition to new rule X on behalf of the Target Range Homeowners Association. Why does the rule allow 95% more phosphorus below the Reserve Street Bridge than above it? It seems the rule is written to accommodate the Missoula sewer treatment plant, which operates below standards. An Environmental Impact Statement should be required. The Missoula treatment plant cannot adequately process its current level of effluent, yet Missoula plans to add hundreds or thousands of additional residences to the failing plant's load. It is not unfair to put the burden on permittees to meet the standards needed under the constitution. Missoula has already wasted \$100,000 defending a faulty system. The standards in the rule should be the same in summer and winter

and above and below the Reserve Street Bridge. There should be an independent oversight committee to inspect the Missoula treatment plant to ensure it meets standards.

22. Michael Murphy made a statement in opposition to new rules I through IX on behalf of the Montana Water Resources Association. He agrees with the statement made by Mr. Bloomquist.

#### **SUMMARY OF WRITTEN MATERIALS**

23. Christian J. Levine, DEQ, supported the adoption of new rules I through IX. The rules establish a classification system for streams with sporadic flow. The classes and associated standards acknowledge that some uses can not be supported in ephemeral streams and ditches. Before a specific water body is reclassified, a use attainability analysis (UAA) must be completed, as required by EPA before it can approve a reclassification that lowers water quality standards or removes a designated use. Ditches that have water throughout the year do not have a special classification.

24. Michael W. Suplee, DEQ, supported the adoption of new rule X. Since the 1970's dense mats of algae have impaired beneficial uses of the Clark Fork River. Since 1998 a Voluntary Nutrient Reduction Program (VNRP) has been in place from Warm Springs Creek to the Flathead River. The VNRP established limits for total Phosphorus, total Nitrogen, and benthic algae



density. The instream limits in the VNRP are being recognized by the four main signatories of the VNRP. The rule would apply the criteria to all point and nonpoint nutrient sources.

25. Claudia L. Massman, DEQ Attorney Specialist, prepared a written review of HB 521 and HB 311 (Private Property Assessment Act) for the proposed rulemaking. HB 521 requires written findings after a public hearing prior to adopting rules more stringent than comparable federal standards. Under new rules I through IX, certain designated uses, such as the protection of fish or water supplies, will not apply to waters that are re-classified under one of the proposed classifications. Thus, the new rules are less stringent than existing standards and less stringent than typically required by EPA fishable/swimmable uses. The standards of new rule X are less stringent than guidelines for nutrients and benthic algae published by the EPA. Because the proposed standards are less stringent than federal guidelines, no written findings are required under HB 521.

HB 311 requires the state to assess the taking or damaging implications of a proposed rule. The proposed rules affect private real property. A Private Property Assessment Act Checklist was prepared, which shows that the proposed rules do not have taking or damaging implications. Therefore, no further HB 311 assessment is required.

26. Gerard P. Berens submitted a letter opposing new rule X for three reasons: (1) the increase in Total Phosphorus at

the Reserve Street Bridge is not warranted; (2) the time period from June 21 to September 21 is arbitrary and capricious because algae grows before and after those dates; (3) an EIS should be required.

27. Judy Jacobson, Chief Executive, Butte-Silver Bow, conditionally supports rule X, upon the inclusion of the goals and timeframe of the VNRP within the rule. The voluntary approach of the VNRP needs to be respected in the rulemaking process. The purpose is to control nuisance algae in the Clark Fork River by controlling nutrients.

28. Chris Levin, Director of Environmental Compliance, Continental Energy Services, Inc., commented on the proposed rules. Numeric standards in WQB-7 should not apply to ephemeral drainages and lakes. Some carcinogens are naturally present in soils or waters and should not be subjected to numeric standards. How will the agricultural industry be protected from new additions of parameters to WQB-7 which are legally used products? Natural water quality is not defined. Would naturally occurring ground waters pumped to the surface be considered naturally occurring?

29. The Tri-State Water Quality Council submitted a letter supporting the proposed numeric standards for the Clark Fork River (new rule X), but recommending that the rule state that the VNRP signatories will have ten years from the date of VNRP approval by EPA Region 8 (October 1998) to meet the standards.

30. Eleanor Mest, Mayor of the Town of Manhattan, submitted a letter supporting new rules I through IX and explaining that the current rules do not adequately address many site-specific situations, such as discharges of treated wastewater into seasonal drainages that do not support aquatic life.

31. Matt Clifford submitted a letter with the comments of the Clark Fork Coalition, which supports adoption of new rule X. The letter noted that the VNRP numeric targets are based on sound science. The different phosphorous standards for the upper river and the middle river are based on the different physical conditions and algae types in these two stretches of the river.

32. Smurfit-Stone submitted a letter supportive of the new rule X.

33. Jim Carlson, Director of Environmental Health, Missoula City-County Health Department, submitted a letter consistent with his oral statement in support of new rule X and specifying the exact language recommended to change the rule. In addition, the letter commented that the time period selected by the rule (June 21 to September 21) is appropriate because during the rest of the year the algal growth appears not seriously to impair river water quality. If the rule applied during the winter, it would have a severe economic impact on Butte and Deer Lodge, which use land application to reduce nutrient discharge. The letter explained that the phosphorous

standard changes at Reserve Street but the underlying algae standard does not change. The species of algae upstream differs from the species of algae below Reserve Street.

34. Attorney Steven Wade submitted a letter on behalf of the Town of Geraldine supporting the classification of low flow and ephemeral streams and drainages but recommending several specific changes to new rules I through IX, including changes to classifications, references to WQB-7, and added language to allow the water quality standards to be based on site-specific factors.

35. Gail Abercrombie, Montana Petroleum Association, submitted comments supporting new rules I-IX, but recommending three specific changes relating to the D-2 classification, WQB-7 standards for carcinogens, and unnecessary language about secondary recreation. As an indication of the need for the rules, Abercrombie referred to the letter to cities and towns with discharge permits from Bonnie Lovelace, Chief, Water Protection Bureau, Permitting and Compliance Division, which advised that tributaries were precluded from use as mixing zones.

36. Ronald E. Nissen, Laurel Cenex Refinery, submitted comments opposing new rules I-IX. Cenex agrees with the intent of the proposed rules with respect to wastewater discharges of small communities, but opposes the proposed rules because the classifications are not clear and overly broad, the rules could possibly add another layer of compliance, the problems of

discharges of small towns not passing standards could be solved with a more specific rule, language about secondary contact for recreation is not clear and could encourage public use of private waterways, the applicability of WQB-7 standards is not clear, and it is unclear how the proposed rules could affect existing MPDES and Storm Water Permits.

37. Lewis R. Schoenberger, Conoco Billings Refinery, submitted a letter requesting clarification of proposed new rules I through IX. The definition of D-2 ditch should be changed to delete the requirement that such ditches be periodically dewatered because if they receive wastewater discharges from a small community year around, they will not be dewatered. WQB-7 carcinogen standards should not apply because these waters will never be used as a drinking water source.

38. Don Allen, on behalf of Western Environmental Trade Association (WETA), submitted comments supporting new rule X and critical of the other proposed rules for lack of clarity. There should be confirmation that existing MPDES permits will not be affected by this rule. WQB-7 carcinogen standards are unrealistic for these waters. The D-2 classification should not require that a ditch be periodically de-watered. Water quality standards should be based on the use attainability of a specific body of water. The application of the proposed rules to agricultural irrigation return flows is unclear. There is concern about the department resources needed for the use attainability analysis while the department is already

struggling to accomplish TMDLs. Natural water quality is not defined. Ephemeral streams should not be subject to numeric standards.

39. On behalf of the Montana Stockgrowers Association, attorney John E. Bloomquist submitted written comments opposing new rules I through IX that were consistent with his oral comments at the hearing. To summarize, the definitions are overbroad, DEQ lacks the staff to conduct the required use attainability analysis at a time when it must also develop TMDLs, the proposed uses of waters are overbroad, the classification of ditches as D-1 and D-2 is arbitrary and should be based on agricultural uses only, not recreation which is actually prohibited by Mont. Code Ann. § 23-2-302. The relationship between ditch water quality and downstream receiving water quality is unclear. The references to natural water quality and WQB-7 parameters are unclear. A better approach would be to address the concerns of small towns with point discharges, and not to regulate non-point source activities.

#### **PRESIDING OFFICER COMMENTS**

40. The Board has jurisdiction to adopt rules for the administration of water quality laws, including rules for the classification of state waters and standards of water quality. Mont. Code Ann. §§ 75-5-201, -301.

41. House Bill 521 (1995) generally provides that the Board may not adopt a rule that is more stringent than comparable federal regulations or guidelines, unless the Board makes written findings after public hearing and comment. The proposed rules are not more stringent than a comparable federal regulation or guideline. Therefore written findings are not necessary.

42. The Private Property Assessment Act (House Bill 311 (1995)), codified as Mont. Code Ann. §§ 2-10-101 through -105, provides that a state agency must complete a review and impact assessment prior to taking an action with taking or damaging implications. The proposed rules may affect real property. A Private Property Assessment Act Checklist was prepared in this matter. The proposed rules do not have taking or damaging implications. Therefore, no further HB 311 assessment is necessary.

43. The procedures required by the Montana Administrative Procedure Act, including public notice, hearing, and comment, have been followed.

44. The Board may adopt the proposed new rules and amendments, or reject them, or adopt them with revisions not exceeding the scope of the public notice.

45. Under Mont. Code Ann. § 2-4-305(7), for any acts in the rulemaking process to be valid, the Board must publish a notice of adoption within six months of the date the Board

published the notice of proposed rulemaking in the Montana  
Administrative Register, or by October 10, 2002.

Dated this \_\_\_\_\_ day of May, 2002.

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THOMAS G. BOWE  
Presiding Officer